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JUN - 8 2000

June 8, 2000

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Reply Comments of Thomson Consumer Electronics in PP Docket No. 00-67

Dear Ms. Salas:

Enclosed for filing please find the original and nine (9) copies of the Reply Comments of Thomson Consumer Electronics in the above-referenced docket.

Please stamp and return to this office with the courier the enclosed extra copy of this filing designated for that purpose. Please direct any questions that you may have to the undersigned.

Respectfully submitted,

Lawrence R. Sidman

Lawrence R. Sidman

Enclosures

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Before the
Federal Communications Commission
Washington, D.C. 20554

JUN - 8 2000

In the Matter of	)	
Compatibility Between Cable Systems And Consumer Electronics Equipment	)	PP Docket 00-67

REPLY COMMENTS OF THOMSON CONSUMER ELECTRONICS, INC.

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REPLY COMMENTS OF
THOMSON CONSUMER ELECTRONICS, INC.

I. INTRODUCTION AND SUMMARY.

Thomson Consumer Electronics, Inc. ("Thomson") respectfully submits these reply comments in the above-captioned proceeding[1] to resolve cable-DTV compatibility issues. In these reply comments, Thomson emphasizes that the record in this proceeding reveals, above all, that a fair and balanced resolution with regard to copy protection is crucial to the DTV future for content providers, the cable industry, manufacturers, and consumers. The Commission should not adopt new rules or dictate license terms at this time, but should encourage all parties to continue to vigorously pursue negotiations on a balanced copy protection scheme.

Thomson believes that reasonable security and access safeguards between the POD and host interface are both necessary and desirable. However, the current draft DFAST license reaches well beyond reasonable security and access and focuses on the

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[1] *Notice of Proposed Rulemaking* in PP Docket 00-67 (rel. Apr. 14, 2000) ("*NPRM*").

distinct issue of copy protection. Thomson believes that such a focus is contrary to the Commission's Rules and policies – which prevent a DFAST licensor from preconditioning product certification and the right to attach on requirements unrelated to security and access. Obfuscating the line between copy protection and security is inconsistent with distinctions made in the Commission's *Navigational Devices Order* and distinctions which are part of the "right to attach" principle.

Perhaps most disturbing from a policy standpoint is the fact that the draft DFAST license threatens to abrogate normal and legal consumer recording practices endorsed by the Supreme Court and supported by Congress. In addition, Thomson is concerned that certain provisions of the draft DFAST license would circumscribe the design and functionality of consumer electronics equipment – stifling efficiency, innovation, and consumer choice at a time when technological advances should be providing consumers with enhanced capabilities. While Thomson's concerns are presently focused on the draft DFAST license, Thomson believes that decisions made now regarding the DFAST license have the potential to establish boundaries that will preserve consumer expectations on a prospective basis.

II. THE TERMS AND CONDITIONS OF A PRIVATE TECHNOLOGY LICENSE MUST NOT SERVE AS A VEHICLE FOR IMPLEMENTING A COPY PROTECTION REGIME.

Thomson firmly believes that reasonable security and access safeguards between the POD and host interface are necessary and desirable and that such security is properly addressed in the context of DFAST licensing. However, the most recent draft of the

DFAST license circulated by CableLabs[2] heightens Thomson's initial concerns, which were generally shared by other commenters, including the Home Recording Rights Coalition ("HRRC")[3], Circuit City Stores, Inc.,[4] and the Consumer Electronics Association ("CEA").[5] The evaluation license moves far beyond security and access and it is inconsistent with the Commission's Rules and policies. In addition, the draft license would prohibit non-infringing uses, thereby undermining the progressive nature of the digital transition from a consumer's perspective. Finally, the terms of the draft license threaten to circumscribe unnecessarily the functions of, and impede development of, consumer electronics equipment.

A. The Draft DFAST License Is Inconsistent with Existing Rules and Policies and Fails to Acknowledge the Distinction Between Security/Access and Copy Protection.

As stated in Thomson's comments, existing rules and policies must govern

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2 Cable Television Laboratories, Inc., Nonexclusive Technology Evaluation License Agreement (draft dated May 5, 2000) ("draft license"). This "Evaluation License" states that it is convertible to a "Product License."

3 Thomson endorses HRRC's core principles and believes that they provide guidance that will be useful in arriving at a balanced DFAST licensing agreement. The Core principles are:

- Fair use remains vital to consumer welfare in the digital age. Consumers should continue to be able to engage in time-shifting, place-shifting, and other private, noncommercial rendering of lawfully obtained music and video content.
- Products and services with substantial non-infringing uses, including those that enable fair use activities by consumers, should continue to be legal.
- Home recording practices have nothing to do with commercial retransmission of signals, unauthorized commercial reproduction of content, or other acts of "piracy." Home recording and piracy should not be confused.
- Any technical constraints imposed on products or consumers by law, license or regulation should be narrowly tailored and construed, should not hinder technological innovation, and may be justified only to the extent that they foster the availability of content to consumers.

Comments of HRRC at 14.

4 Comments of Circuit City Stores, Inc. at 15-21.

5 Comments of CEA at 14-18.

the boundaries of the DFAST license. Congress recognized that competition involving cable-compatible equipment was unnaturally thwarted by the cable industry under the theory that a monopoly was necessary to protect against security concerns.

In Section 629 of the Telecommunications Act of 1996, Congress instructed the Commission to "adopt regulations to assure the commercial availability" of equipment used to access multichannel video programming and other services offered over multichannel video programming systems from non-affiliated manufacturers and vendors.[6]

The Commission implemented Section 629 by adopting rules and policies regarding the commercial availability of navigation devices. As the Commission stated in its *Navigation Devices Order*,[7] "certain parameters are necessary to ensure the movement of navigation devices toward a fully competitive market" and to remove an unjustified impairment to competition and consumer choice.[8] Consistent with Section 629(b), the Commission recognized cable operators' legitimate concerns regarding system security and signal theft.

In the *Navigation Devices Order*, the Commission took the significant step of applying the *Carterfone*[9] "right to attach" principle, originally found in the telephone context, to navigation devices. Specifically, cable subscribers were assured their right to attach compatible navigation devices, subject only to the "proviso that the attached equipment not cause harmful interference, injury to the system or compromise legitimate

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6 47 U.S.C. §549(a).

7 *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices, Order*, 13 FCC Rcd 14775 (1998) ("*Navigation Devices Order*").

8 *Navigation Devices Order* at ¶ 3 (emphasis added).

access control mechanisms."[10] Simultaneously, the Commission prohibited multichannel video providers[11] from using contracts, agreements, patents, intellectual property rights, or other means to impose requirements unrelated to protection against threats to system security and conditional access.[12]

Consequently, as a number of parties, including Thomson, point out in their comments, a DFAST license cannot precondition product certification and the right to attach on requirements unrelated to system security or conditional access. Copy protection is completely different from security or access. As the Home Recording Rights Coalition explains, "conditional access" applies to providing a signal on the condition that a customer pays for it. "Copy protection" applies to signals already purchased.[13] And as a number of commenters state, copying is a fair use under appropriate circumstances as held by the Supreme Court.[14] Of course, the fair use doctrine is not a defense to the act of gaining unauthorized access.

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9 *See Carterfone*, 13 F.C.C.2d 420 (1968).

10 *Navigational Devices Order* at ¶ 29 (emphasis added). *See also*, 47 C.F.R. § 76.1201, which provides: "No multichannel video programming distributor shall prevent the connection or use of navigation devices to or with its multichannel video programming system, except in those circumstances where electronic or physical harm would be caused by the attachment or operation of such devices or such devices may be used to assist or are intended or designed to assist in the unauthorized receipt of service."

11 The National Cable Television Association ("NCTA") argues that the restriction on licensing terms does not apply to CableLabs because it is not a "multichannel video programming distributor." The Commission's Rules cannot so easily be evaded. CableLabs members "must be a cable television system operator (as defined by the Cable Act)," and therefore the Rule is properly attributed to CableLabs (and any other entity composed of MVPDs). *See* CableLabs – Members http://cablelabs.com/members/index.html.

12 *See* 47 C.F.R. § 76.1204(c), which provides: "No multichannel video programming distributor shall by contract, agreement, patent, intellectual property right or otherwise preclude the addition of features or functions to the equipment made available pursuant to this section that are not designed, intended or function to defeat the conditional access controls of such devices or to provide unauthorized access to service."

13 Comments of HRRC at 11.

14 *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

In sum, while DFAST licensing agreements may include reasonable security and conditional access obligations, they cannot, and must not impose copy protection requirements.

B. The Digital Transition Must Be A Step *Forward* From the Perspective of Consumers; Consumer Expectations Regarding DTV Equipment Functionality Must Be Balanced With the Interests of Content Owners.

A fundamental expectation driving DTV innovation, investment and the overall transition has been that DTV will be a giant leap forward for consumers, not only revolutionizing their television viewing experience, but also facilitating the introduction of new capabilities and functionalities not possible with analog television. While Thomson recognizes the importance of protecting the interests of DTV content providers, these interests must be balanced with the need to ensure consumers that their leap into DTV will not be a leap *backward* with regard to the way in which they utilize their television equipment. Unfortunately, certain terms of the draft DFAST license threaten to greatly disrupt that balance, particularly with regard to negating consumers' ability to make "fair use" recordings. Such an outcome would be a monumental step backwards for consumers, and clearly not in the public interest.

The doctrine of fair use is over 150 years old and has remained an adaptable and integral component of copyright law.[15] In the *Betamax* decision,[16] the Supreme Court examined fair use in the home recording context and found that recording programs for later viewing in the privacy of the user's home (*i.e.*, "time shifting") not only is a noncommercial use permitted by fair use, but also one that furthers the First

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[15] The doctrine can be traced to *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901). Congress codified fair use in section 107 of the Copyright Act of 1976. *See* 17 U.S.C. § 107.

[16] *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

Amendment's goal of disseminating information to the fullest extent.[17] The *Betamax* Court recognized that fair use is not a static concept, but one that is adaptable to new technologies and one that is essential to ensuring that interests of content providers are balanced with society's interest in the "free flow of ideas, information and commerce."[18]

As consumers transition to the digital age, the draft license would prohibit licensed products (and consumers) from recording and storing content designated as "never to be copied," even for traditional and legitimate time-shifting purposes.[19] While it is unclear the amount of content that would be so designated, one can already hear angry consumers demanding to know why their digital VCR or their hard-disk personal video recorder could not record – for personal use – the feature movie or other desired program they planned to watch several days later. By prohibiting such fair use recordings, the draft DFAST license threatens to up-end consumers' long-established viewing practices, potentially making digital television less desirable than what they already have.

Drawing a technological line on fair use – between analog and digital – as the DFAST license would do, is at odds with the Digital Millenium Copyright Act of 1998, where Congress recognized that fair use must not be an "analog-only" right. The legislative history of the Act confirms that the Copyright Act's fair use provision[20] is well understood and continues to apply in the digital environment. In its Report accompanying the Act, the Senate Judiciary Committee determined that: "[t]he bill does

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17 *Id.*

18 *Id.* at 429.

19 *See* Draft License, Exhibit C, Section 3 ("Copying, Recording, and Storage of POD-CP Data").

20 17 U.S.C. § 107.

not amend section 107 of the Copyright Act, the fair use provision. The Committee determined that no change to section 107 was required because section 107, as written, is technologically neutral, and therefore, the fair use doctrine is fully applicable in the digital world as in the analog world."[21] The House Commerce Committee Report notes Congress' "longstanding commitment to the principle of fair use" and states that "the ability of individual members of the public to access and to use copyrighted materials has been a vital factor in the advancement of America's economic dynamism, social development, and educational achievement."[22]

Moreover, the continuing role of the fair use doctrine in the digital age is apparent in the text of the Act itself: Section 1201 does not prohibit the act of circumventing a technological measure that prevents copying, and contains a specific clause stating that nothing in section 1201 affects "rights, remedies, limitations or defenses to copyright infringement, including fair use."[23]

Thus the Digital Millenium Copyright Act recognizes that the fair use provision of the Copyright Act provides the necessary balance between the interests of content providers and society at large. Inherent in this balance is the notion that copy protection is primarily a legal rather than a technological issue, although technology can play a helpful role in enforcement.[24] Emphasizing the legal component of copy protection

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21 S. Rep. No. 105-190, at 23-24 (1998).

22 H.R. Rep. No. 105-551, at 35 (1998).

23 *See* 47 U.S.C. § 1201(c)(2). While the May 5 draft DFAST license includes a similar savings clause preserving fair use, the copy protection proscriptions in Exhibit B would effectively eliminate normal and fair use recording practices.

24 *See* Comments of CEA at 17 ("There is no "fool-proof" technical solution that will prevent unauthorized copying of copyrighted material . . . [e]ffective law enforcement is the appropriate remedy to deal with the relative handful of individuals who engage in illegal piracy.")

permits enforcement where necessary, and otherwise preserves consumers' rights. Conversely, emphasizing the technological component may have the undesirable ancillary effect of halting the free flow of content and preventing normal, noncommercial, and fair uses of that content. Nonetheless, NCTA appears to believe that a private commercial copy protection regime with a technological basis is the answer and goes so far as to suggest that the Commission should waive any Navigation Device rule inconsistent with the terms of the draft DFAST license.[25]

Recasting copy protection as principally a technological issue and imposing a private copy protection regime on consumers, as the draft DFAST license would do, would have the undesirable result of preventing honest people from engaging in normal and legal practices, ironically twisting DTV from a progressive to a regressive technology for consumers in some regards. As we transition to the digital age, and as a core public policy matter, consumers should not be deprived of the ability to continue normal and popular recording practices, but rather should be free to reap the benefits of technological progress.

C. The Operation and Design of Consumer Electronics Equipment Must Not Be Circumscribed by A Narrow Licensing Process.

Thomson remains opposed to any provisions of a DFAST license which would vest the licensor with an unprecedented amount of control over the operation, design and development of consumer electronics equipment. The terms of a licensing agreement must not vest a third party with the power to render a consumer device obsolete post-sale, and they must not dictate the design and manufacture of equipment.

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[25] Comments of NCTA at 23.

First, as noted in Thomson's comments, consumers who have purchased equipment rightfully expect that equipment to remain under their exclusive control. No third party should ever have the right to unilaterally disable consumer's equipment. Not only are there no assurances that such a power could be exercised with the precision necessary to protect honest consumers, but such an encroachment by a third party into the homes of consumers is an ominous precedent that must be prevented.

Second, the draft DFAST license prioritizes copy protection at the expense of design efficiency, innovation and consumer choice. For example, Exhibit B to the draft license prohibits "switches, jumpers, traces that may be cut, or control functions means (such as remote control functions) by which the encryption technologies may be defeated."[26] The drafters of the Digital Millenium Copyright Act recognized the importance of not mandating that manufacturers of consumer electronics products design their products to respond to particular technological protection measures. As a result, subsection 1201(d)(3) of the Act clarifies that no affirmative design mandates are imposed on manufacturers. As the Senate Judiciary Committee Report notes: "This provision recognizes that there may be legitimate reasons for a product or a component's failure to respond to a particular technological measure – such as design efficiency or ensuring high quality output from the product."[27] Conversely, the terms of the draft DFAST license would have the ultimate effect of stifling innovation and product development.

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[26] *See* Draft License, Exhibit B, Section 1.

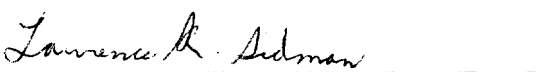
[27] S. Rep. No. 105-190, at 12-13 (1998).

III. CONCLUSION.

While Thomson recognizes the necessity of reasonable security and access safeguards between the POD and host interface, the terms of a DFAST license must not impose a broad copy protection regime on consumers and manufacturers. The Commission should forcefully encourage negotiations on a balanced copy protection scheme that gives credence to established consumer rights and practices, does not infringe upon or dictate equipment functions or design and provides protection for the intellectual property rights of content providers against unlawful seizure and distribution of that property.

Respectfully submitted,

THOMSON CONSUMER ELECTRONICS, INC.



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